

“LIVE ANIMALS”: TOWARDS PROTECTION FOR PETS AND LIVESTOCK IN CONTRACTS FOR CARRIAGE

ERIN SHELEY*

In October of 1997, the Calk family flew on American Airlines from Newark, NJ, to Los Angeles, CA. Upon arrival, Mr. Calk went to pick up Jed, the family's golden retriever, but was told that Jed was “not ready yet.” When Mr. Calk went back 20 minutes later to retrieve him, Jed was not breathing and was covered in urine, feces and vomit. Jed died on the way to the emergency vet. An autopsy revealed that he had died of suffocation due to lack of oxygen.¹

The plight of pets on air carriers became a national news item in the late nineties, when a series of tragedies like Jed’s made headlines across the country. For a loving pet owner, air travel is perhaps the paradigmatic situation of helplessness—aside from the veterinarian (who is, at least, a trained medical professional with an intimate knowledge of animals)—few individuals can wield as complete, and potentially devastating, control over a pet as a baggage handler. And in no other situation is the discrepancy in human valuation of animals quite so dramatic: to the Calks, for example, Jed was a family member; to American Airlines he was—as a matter of official policy—a piece of luggage, and valued as such. Yet as heartbreaking as the deaths of pets are, they are merely the tip of the iceberg of animal suffering throughout the arteries of transportation in America.

The food industry processes roughly 8 billion living creatures per year behind the cement walls of factory farms across the country. A great many of these animals are moved *en masse* from farm to slaughter in un-air-conditioned trucks, without food or water for up to a day and a half. The most powerful protection ever provided by federal law for food animals was the 1877 “28-Hour Law,” which regulated the conditions under which livestock were transported. Perhaps because, before the age of factory farms, the train seemed like the worst part of a food animal’s existence, or perhaps simply because of the early understanding of the scope of the Commerce Power, transportation was the particular locus of humane federal policymaking. Though we have, unfortunately, moved far from this goal now, the issue of transportation is still a unique one in animal law. In the case of pets as well as of food animals, transportation creates a sphere in which relations with a third party (the carrier) affect the owner-animal relationship. Because carriage involves a contract between owner and carrier, the rigid principles of contract law usually govern claims for damages, instead of the more expansive standards of valuation available in animal tort claims over harm to pets. And, though pets fare better in practice than food animals due to the concerns of their owners for their wellbeing, the statutory protections for animals in transit are somewhat weak in both cases.

In this Article, I will begin by reviewing the current treatment of animals in transportation, with an emphasis on the polar extreme cases of pets and food animals, and will describe the relevant common law and statutory regulation of the field. I will then suggest ways in which, through common law contract adjudication, the current legal system can better protect

* For Sam Dog. Erin Sheley is an attorney with Gibson, Dunn & Crutcher in Washington, D.C.

¹ *Legislators Lobby For Safer Air Travel For Pets*, WORLD AIRLINE NEWS, March 3, 2003.

animals in transportation, even in the absence of further statutory protections. I will argue that courts should make use of two well-established doctrines of contractual interpretation to arrive at more humane results for animals. First, with respect to all animals protected by the Animal Welfare Act (most mammals except for food animals), courts should render contracts for carriage under cruel conditions unenforceable as against public policy. In this manner, run-of-the-mill contractual disputes between self-interested parties could result in greater enforcement of the regulations promulgated under the AWA. Second, with respect to pets in air travel, the doctrine of unconscionability should fill the gap left by the Safe Air Travel for Animals Act to render unenforceable contractual terms limiting carriers' liability to nominal sums when animals suffer for their negligence.

I. REALITIES FOR ANIMALS IN TRANSPORTATION: A COMPARISON OF PETS AND FOOD ANIMALS

A. PETS AND THE "FRIENDLY SKIES"

Tragedies like Jed's make good news pieces and thus attract a great deal of attention. They are far from the paradigmatic examples of animals in transportation, however: the billions of farm animals who suffer and perish each year and who receive no legal protection while being transported (and little at any other stage of their lives) eclipse, on the numbers anyways, the handful of pets that die on airplanes each year. Most disturbing about the airline context, however, is the negligible value it ascribes not only to living creatures, but to the feelings their family members have for them. In 1999, for example, TWA flight attendants rebuffed Gordon Anzalone's frequent and panicked attempts to check on his eight-year-old boxer Enzo, who was trapped in the cargo hold during a delay in boiling heat in St. Louis, Missouri. When he saw Enzo again he was dead of heat stroke, wheeled out on a cart by an airline employee. "There was no blanket over him, and fluids were oozing out of every cavity," Anzalone told Court TV, "My wife just collapsed."² Anzalone sued TWA for \$100,000, but the airline went bankrupt before his case went to trial.

Due to the new reporting requirement of the Safe Air Travel for Animals Act (discussed in detail in Part IIIc of this Article), we now have data on the numbers of pets killed or injured on airlines for the last ten months. Previously, statistics provided by the Air Transport Association (ATA) suggested that 500,000 pets are transported per year, out of which about 5,000—1%—are killed, injured or lost.³ With the new data published by the Federal Aviation Administration (FAA) we know that in the last ten months 25 pets have died, 18 been injured, and five been lost on major U.S. carriers.⁴ The discrepancy between these numbers and the 5,000-per-year figure originally computed by the ATA raises the question of under-reporting. Appendix A to this article breaks down these incidents by month, and by carrier.

The worst record by far (assuming all airlines are honestly reporting) is that of Continental Airlines. While the average number of animal deaths (out of airlines reporting *any* incidents at all—and thus excluding those who didn't report deaths) was 1.7 and the average number of animal injuries was 1.3 for the ten-month period, Continental's numbers were seven

² Kate Stamell, *New Law Requires Airlines to Disclose Information on Pet Deaths*, June 17, 2005, at http://www.courtstv.com/people/2005/0616/pets_ctv.html.

³ Betsy Wade, *Animals by Air: It's Beastly*, N.Y. TIMES, April 23, 2000.

⁴ AVIATION CONSUMER PROTECTION DIVISION, U.S. DEPARTMENT OF TRANSPORTATION, AIR TRAVEL CONSUMER REPORTS (2005-2006) available at <http://airconsumer.ost.dot.gov/reports/index.htm>.

and six respectively.⁵ The runner up for deaths was American Airlines, with five, though American did not report any injuries.⁶ In all seven of the deaths on Continental planes, the reports submitted to the FAA by Continental concluded that “no corrective action [was] necessary” on the part of the airlines to the owners because “Continental policy was followed.” Most of the incidents were attributed to pre-existing conditions worsened by the “stress” of travel, leaving open the question of whether “Continental policy” could be modified to lessen such stress. In one particularly unusual case, a black chow dog managed to let herself out of her kennel inside of the baggage hold during the flight. When the hold was opened, she jumped down to the runway and roamed the Houston tarmac for an hour before employees caught her. She died of heat exhaustion the next morning. In this instance the only corrective action Continental deemed necessary was to “continue and reinforce” its policy of requiring cable ties on kennel doors.⁷ In sum, though pet deaths in transportation may get a disproportionate amount of attention relative to those of farm animals, it can fairly be said that the airline industry’s attitude towards its non-human passengers is perhaps unwarrantedly sanguine.

B. ROAD TO PERDITION: THE TRANSPORTATION OF FOOD ANIMALS

Michael Fox describes “factory farming” as “the subjugation of life to the industrial system; the subordination of individual rights and autonomy to goals of efficiency and productivity; the maintenance and propagation of life under wholly unnatural conditions; the dependence of life on drugs, vaccines, and technology.”⁸ This language is dramatic, but hardly an exaggeration—in the typical factory farm, animals do not have enough space even to turn around; certain animals, like pigs and chickens, “are housed in massive confinement buildings that resemble factory warehouses, and most of these animals never see the outdoors until they are sent to slaughter.”⁹ And this relegation of living animals to the status of inanimate objects extends to transportation as well. Food animals who, with the increasing centralization of slaughter facilities, endure longer and longer transports, are denied food, water, and protection from extreme temperatures while in transit.¹⁰ The animal activist group Compassion Over Killing (COK) once documented the 35-hour long transportation of 283 pigs by truck, from Kansas City, Missouri to Modesto, California. According to COK, the driver said he would not let the animals out for the entirety of the trip.¹¹ Investigators also allegedly observed dead animals left for more than 30 hours on the truck with the live animals, 95-degree temperatures, ammonia accumulation resulting in coughing and foaming at the mouth, and “numerous injuries including scratches, bruises, abrasions, and bleeding lacerations on their bodies, legs and ears.”

⁵ *Id.*

⁶ *Id.*

⁷ Continental Airlines, *Animal Incident Report to the U.S. Department of Transportation, June 1-30, 2005*, July 15, 2005, available at <http://airconsumer.ost.dot.gov/reports/2005/august/Continental.doc>.

⁸ MATTHEW FOX, *INHUMANE SOCIETY* 43 (1990).

⁹ GARY FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* 10 (2000).

¹⁰ C. Weeks & C. Nicol, *Poultry Handling and Transport*, in *LIVESTOCK HANDLING AND TRANSPORT* 363-84 (Temple Grandin ed., 2000); MICHIGAN STATE UNIVERSITY COLLEGE OF LAW ANIMAL LEGAL & HISTORICAL CENTER, *TWENTY-EIGHT HOUR LAW OF 1877*, (2005) at www.animallaw.info/statutes/stusfd49usc80502.htm.

¹¹ THE HUMANE SOCIETY OF THE UNITED STATES, *Loophole on Wheels: Trucks and the 28-Hour Law*, at http://www.hsus.org/farm_animals/farm_animals_news/trucks_and_the_28-hour_law.html.

Unfortunately, ad hoc investigations like those done by COK represent the bulk of the studies of the effects of transportation on farm animals.¹² The science that does exist, unsurprisingly, shows the detrimental effects of crowded transportation conditions. Jersey bull calves were found to have higher heart rates when free to move around than when kept in wood crates.¹³ Carcass bruising on livestock was found to increase with increased packing density.¹⁴ Furthermore, studies in the United Kingdom have shown that 3% of broiler chickens have broken bones before they are stunned, and around 1% arrive dead at the processing factory, from injuries presumably acquired either while being packed into transport crates or transported.¹⁵ Of the birds that arrive dead at the factory, 35% were determined to have died of injuries sustained directly during catching or transportation, and 40% to have died of “stress or suffocation.” This is unsurprising given the nature of their transport conditions: the chickens are packed into crates in loads of 3000 birds per truck.¹⁶ The injuries most commonly reported include dislocated and broken hips, wings, and legs, in addition to internal hemorrhaging.¹⁷ It should be noted that transporting chickens has actually become less common in the United States, where broiler operations are “vertically integrated”: rearing sheds, feed mills, and processing plants are increasingly contained in a single facility.¹⁸

In the American dairy industry, meanwhile, newborn calves are sometimes transported before they are old enough to walk, resulting in high numbers of deaths.¹⁹ Pigs and poultry, who have been selectively bred for extremely large muscles, often perish during transportation through sheer genetic weakness.²⁰ Even horses suffer through negligent transportation—double-deck cattle trucks, which generally provide enough room for cattle, are dangerous to tall horses whose heads can hit the ceiling when the vehicle stops abruptly or passes over a bump in the road.²¹ Transportation conditions are perhaps worst when animals undergo international journeys. Australia exports seven million sheep a year to the Persian Gulf—in one five-year period it was calculated that more than a million died in transit. The Saudi Agricultural Ministry reported that one shipload of 68,000 sheep was rejected at Damman and, when it docked later in Kuwait, there were only 21,000 left alive on board. Allegations of cruel handling on these journeys include stories of sick sheep being thrown overboard alive to feed the sharks. Andrew Johnson describes this trade, from Australia and New Zealand, as the most brutal in the world:

On the journey to the Middle East, they are packed three to the square meter for an eighteen-day voyage, and after unloading they are kept in holding yards before going to

¹² UNITED STATES DEPARTMENT OF AGRICULTURE, ANIMAL WELFARE ISSUES COMPENDIUM (1997).

¹³ D.B. Stephens & J. N. Toner, *Husbandry Influences on Some Physiological Parameters of Emotional Responses in Calves*, 1 APPL. ANIM. ETHOL. 233-243 (1975).

¹⁴ G.A. Eldridge et al., *Responses of Cattle to Different Space Allowances, Pen Sizes and Road Conditions to Transport*, 28 AUST. J. EXPT. AGRIC. 155-159 (1988).

¹⁵ N.G. Gregory & L.J. Wilkins, *Broken Bones in Chickens: Effect of Stunning and Processing in Broilers*, 31 BRITISH POULTRY SCIENCE 53-58 (1990).

¹⁶ ANDREW JOHNSON, FACTORY FARMING 135 (1991).

¹⁷ I.J.H. Duncan, *The Assessment of Welfare During the Handling and Transport of Broilers*, in PROCEEDINGS OF THE THIRD EUROPEAN SYMPOSIUM ON POULTRY WELFARE 79-91 (J.M. Faure & A.D. Mills eds., 1989); N.G.

Gregory & L.J. Wilkins, *Skeletal Damage and Bone Defects During Catching and Processing*, in BONE BIOLOGY AND SKELETAL DISORDERS IN POULTRY (C.C. Whitehead ed., 1992).

¹⁸ *Id.*

¹⁹ ENCYCLOPEDIA OF ANIMAL RIGHTS AND ANIMAL WELFARE 335 (Marc Bekoff ed., 1998).

²⁰ *Id.*

²¹ *Id.*

the slaughterhouse. Substantial mortality occurs at every stage of the journey: in 1983 15,000 sheep died of exposure in an Australian feedlot, and in 1981 over 12,000 died on board the *Persia* due to mechanical breakdowns. And when the *Farid Fares* caught fire and sank off South Australia in 1980, more than 40,000 sheep were either drowned or burnt alive.²²

Johnson notes that in 1973, after more than 4,000 out of 30,000 sheep perished on their way to Iran, New Zealand banned live exports.²³ The ban was reversed in 1985, after successful lobbying by farmers. Meanwhile, a select committee of the Australian Senate proposed that the trade in live sheep be replaced by refrigerated carcasses, “particularly in view of the fact that when it gets to the Arab states most of the meat is frozen immediately after slaughter.”²⁴

II. ANIMALS AS “GOODS” UNDER THE COMMON LAW OF CONTRACT FOR CARRIAGE

As stated, animal transportation is governed for the most part by the common law of contract for carriage. The field of contract law is generally characterized by a particularly stingy treatment of the value of animal life. Animals may be classed as “goods” under the Uniform Commercial Code and similar state statutes, and court disputes over treating animals as “goods” or “products” are often relevant to whether product liability analysis applies to “defective” animals.²⁵ For example, in *Sease v. Taylor’s Pets*, a skunk bought from a pet store was considered a product under Oregon commercial law.²⁶ By contrast, in *Anderson v. Farmers Hybrid Co.*, an Illinois appellate court held that diseased pigs were *not* “products” in the commercial sense because animals are not “of a fixed nature at the time [they] leave the seller’s control.”²⁷ Of course, a more capacious understanding of animal nature is in no way a richer valuation of the animal life in and of itself. It is merely a means of shifting the costs of harm to the animal from the seller to the buyer, due to the animals’ participation “in a constant interaction with the environment around them,” and the likelihood of this interaction damaging them and thus harming the buyer’s property interest.²⁸ Contract law for the carriage of animals—generally non-companion animals—has been a point of interest in the international law context as well. The Hague Rules governing international shipping—which the United States enacted as the Carriage of Goods by Sea Act (COGSA) in 1936—exempted carriers from liability for harm to live animals, presumably on a logic similar to that of the court in *Anderson*.²⁹ The Hague Rules, however, have since been supplanted internationally by the Hamburg Rules, which the United States has not ratified.³⁰ Under the Hamburg Rules carriers can be held liable for harm to animal “goods” attributable to their negligence, though not if the harm is attributable to “special

²² Fox, *supra* note 2, at 136.

²³ *Id.*

²⁴ *Id.* at 219.

²⁵ 689 SONIA WEISMAN ET AL., ANIMAL LAW § 4(4)(B) (2d ed., 2002) (citing *Embryo Progeny Assocs. v. Lovana Farms, Inc.*, 416 S.E.2d 833 (Ga. Ct. App. 1992) (cattle and other animals considered “goods” under UCC); *Key v. Bagen*, 221 S.E. 2d 234 (Ga. Ct. App. 1975) (sale of a horse); *Young & Cooper, Inc. v. Vestring*, 521 P. 2d 281 (Kan. 1994) (sale of cattle)).

²⁶ 700 P.2d 1054 (Or. Ct. App. 1985).

²⁷ 408 N.E. 2d 1194, 199 (Ill. App. Ct. 1980).

²⁸ *Id.*

²⁹ 46 U.S.C. § 1301 (c).

³⁰ United Nations Convention on the Carriage of Goods by Sea, March 31, 1978, 17 I.L.M. 603 (hereinafter Hamburg Rules).

risks” inherent in shipping animals, and if the carrier has complied with any special instructions provided by the shipper.³¹ Critics have argued that the United States’ failure to ratify the Hamburg Rules, and decision to retain COGSA unchanged since 1936, have made our laws on international shipping—including their application to animals—incompatible with those of our major trading partners.³²

The valuation of animals has been a hotly contested topic in all areas of the law, but has gained a bit more traction in tort law. Courts have occasionally recognized claims of intentional infliction of emotional distress by owners who have lost their pets to acts of malicious cruelty by others, though they have been more reluctant to allow claims for negligent infliction of emotional distress.³³ The predominant rule, which allows owners to recover only market value for harm to their animals, has been widely criticized.³⁴ In perhaps the most detailed exposition of the subject, Steve Wise has attacked the market valuation of companion animals in tort claims, concluding:

By definition and common experience, companion animals have no economic value to their owners. This has been known to the common law for hundreds of years. Instead, the value of companion animals...lies in their bi-directional relationship...[a pet’s] human companion suffers an injury that is of the same kind, if not necessarily of the same degree, that she would suffer from the wrongful killing of any other family member.³⁵

Also arguing for a more capacious valuation, Geordie Duckler has noted that animals are “inherently unique and irreplaceable” and “relatively unusual” compared to most items in the stream of commerce, and have “a relatively serious impact on human communities.”³⁶ Duckler makes out a moral claim for the special treatment of companion animals in particular: “our companion animals are...a conceptually and biologically distinct category of pet. We own companion animals for different intellectual reasons than we own other animals, even though the

³¹ *Id.* art. 1, § 5; art. 5, §5.

³² See, e.g., Michael Sturley, *Proposed Amendments to the Carriage of Goods by Sea Act*, 18 HOUS. J. INT’L L 609 (1996).

³³ Compare *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. Ct. App. 2001) and *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. 1964) with *Rabideau v. City of Racine*, 243 Wis. 2d 486, 627 N.W.2d 795 (Wis. 2001).

³⁴ Most of the scholarship has focused on standards of valuation for companion animals in particular. See, e.g., Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059 (1995); Margit Livingston, *The Calculus of Animal Valuation: Crafting a Viable Remedy*, 82 NEB. L. REV. 783 (2004); Lynn A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets’ Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L. J. 31 (2001); Elizabeth Paek, *Fido Seeks Full Membership in the Family: Dismantling the Property Classification of Companion Animals by Statute*, 25 U. HAW. L. REV. 481 (2003); William C. Root, Note: “Man’s Best Friend”: Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for their Wrongful Death or Injury, 47 VILL. L. REV. 423 (2002); Lisa Kirk, Note and Comment: *Recognizing Man’s Best Friend: An Evaluation of Damages Awarded When A Companion Pet is Wrongfully Killed*, 25 WHITTIER L. REV. 115 (2003); Comment: *Negligent Infliction of Emotional Distress and the Fair Market Value Approach in Wisconsin: The Case for Extending Tort Protection to Companion Animals and their Owners*, 2002 WIS. L. REV. 735 (2002). But see Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: the Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227 (2006) (arguing that the current regime of market valuation results in “low and predictable costs of veterinary services” and that allowing non-economic damages in “pet litigation” would be “unsound public policy”).

³⁵ Steven Wise, 4 ANIMAL LAW 33, 93 (1998).

³⁶ Geordie Duckler, 8 ANIMAL LAW 199, 203-04 (2002).

general theme of “ownership” nevertheless applies.³⁷ Duckler notes that, just as human life has been “converted into dollars” for the purposes of tort liability, similar considerations of companionship could govern compensation for the loss of pets.

A version of Duckler’s argument is implicit in the well-publicized outrage over courts’ failure to find a distinction between animal passengers on airplanes and other baggage that is checked to the cargo hold. Yet it is important to note that these transportation cases offer two potential grounds for liability: not only tort but contract as well. In *Deiro v. American Airlines*, seven greyhounds perished and two were injured after the airlines allegedly left them on a baggage cart with only one side open in 100-degree heat at Dallas-Fort Worth, without ventilation, shelter or water. The court applied federal common law governing carriers and upheld the airline’s limit of liability to the \$750 for lost luggage stipulated by the contract of carriage (the airline ticket).³⁸ The court barely engaged potential grounds for distinction between the animals and other baggage, focusing on the fact that “[t]he notice is clearly marked and although it does not set out the rate schedule, it lets the shipper know that there is a need to pay more for shipment when the value of the *baggage* exceeds \$750.”³⁹ To the plaintiffs’ assertion that a reasonable person would not believe it applied to dogs, the court pointed to additional language in the contract of carriage stating that “Certain live animals (such as cats, dogs and household birds) will be accepted as baggage when confined in a container, subject to American’s rules and charges.”⁴⁰ In other words, the court upheld the validity of an airline turning a living creature into a piece of baggage through the text of a contract, so long as that limitation is “reasonably communicated” to the passenger.⁴¹

The holding of *Deiro* has been applied to animals in carriage just once since it was decided. In *Gluckman v. American Airlines* the airlines left the plaintiff’s two-and-a-half-year-old golden retriever in a non-ventilated baggage compartment in the Phoenix Sky Harbor Airport for over an hour.⁴² Temperatures in the compartment reached 140 degrees, and when the plaintiff next saw his dog he “was lying on his side panting; his face and paws were bloody; there was blood all over the crate; and the condition of the cage evidenced panicked effort to escape.”⁴³ The veterinarian determined that Floyd had suffered heat stroke and brain damage, and the plaintiff was forced to put him to sleep. On the way to dismissing the plaintiff’s tort claims for emotional distress and loss of companionship, the court also cited *Deiro* for the proposition that the airline’s contractual liability was validly limited by the terms of the airline ticket.⁴⁴ These cases suggest that courts will follow the federal common law applicable to the shipment of goods, and disallow tort claims for the negligent death of pets, so long as the carriers have been clear in contractually limiting their liability.

³⁷ *Id.* at 208.

³⁸ Civil No. 84-848-JU (D. Or. Aug. 21, 1985), *aff’d*, 816 F.2d 1360 (9th Cir. 1987).

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.*

⁴¹ It is striking that *Deiro* has come to be cited, not as an animal law case, but for the broader federal common law test as to whether a carrier has clearly limited liability for negligent transport of goods. The two-pronged test—the physical characteristics of the contract and the circumstances surrounding its purchase—has been applied primarily to physical objects such as jewelry, helicopter blades, and cameras. *See, e.g., Hill Constr. Corp. v. American Airlines*, 996 F.2d 1315, 1317 (1st Cir. 1993); *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 521 (5th Cir. 2002); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 928 (5th Cir. 1997).

⁴² 844 F. Supp. 151 (S.D.N.Y. 1994).

⁴³ *Id.* at 154.

⁴⁴ *Id.* at 161.

III. LEGISLATIVE INROADS

This treatment of animals in transportation at common law forms the backdrop for a modest scheme of statutory protections. The most robust regulations of animal transportation derive from the Animal Welfare Act, but do not apply to food animals. Indeed the only statute on the books concerning the transportation of food animals, the 28-Hour Law, has been rendered virtually nugatory by the failure of the USDA to apply it to trucks, in addition to trains. Finally, the Safe Air Travel for Animals Act attempts to provide extra protections for the privileged class of pets, but it too is weak in fundamental ways.

A. RIGHTS FOR “DUMB ANIMALS”? FOOD ANIMALS AND THE 28-HOUR LAW

It is curious to note that livestock originally received greater statutory protection while being transported than in their daily lives at slaughterhouses. The 28-Hour Law attempts to mandate humane conditions for animals being transported by common carriers—excluding air or water transport.⁴⁵ Passed in 1872 and signed into law by Ulysses S. Grant, the law prevents carriers from confining animals for more than 28 consecutive hours without unloading them for feeding, water, and rest, although it allows sheep, specifically, to be confined for an additional eight hours if the confinement ends at nighttime.⁴⁶ When unloaded, the law specifies that animals be placed into “pens equipped for feeding, water, and rest” for at least 5 consecutive hours.⁴⁷

There is no question that the 28-Hour Law was prompted by concern for the animals themselves. During congressional floor debate, Senator Allen Greenberry Thurman (D-OH) proclaimed, “I have witnessed with my own eyes the torture of these beasts until I turned away because I could not look at it any longer.”⁴⁸ Senator Lot Myrrick Morrill stated, “[W]hen we know what takes place on the great highways of commerce, I think it a very provident thing, and one of very high expediency, that the Government of the United States should interpose its authority, and at least in some way give an admonition which shall teach men that even dumb animals have rights which are not to be violated.”⁴⁹ And the language of the statute itself underscores this purpose when specifying that the animals “shall be unloaded in humane way.”⁵⁰ When compared with the exemption of animals living in factory farms from the provisions of the Animal Welfare Act (AWA), the impetus behind the 28-Hour Law seems to be a legitimate prioritization of the suffering of farm animals. This interest in humanity, however, sits uncomfortably with the statutory provision that an owner may request in writing that the 28-hour period be extended to 36 hours, as though the duty of the carrier with respect to the remaining eight hours belongs to the owner, rather than the animal himself.

This schizophrenic sense of duty was developed in the case law construing the statute. In noting that the Act does not change normal common law duties of carriers to shippers under state law, some state courts have held that a carrier’s exceeding the 28-hour limit *does* constitute

⁴⁵ 49 USCS § 80502 (a)(1).

⁴⁶ *Id.* § 80502 (a)(2).

⁴⁷ *Id.* § 80502(b)(2).

⁴⁸ Attachment 5, Cong. Globe, 42nd Cong., 2d. Sess. 4236 (1872).

⁴⁹ *Id.* at 4228.

⁵⁰ 49 USCS § 80502 (b).

negligence per se for the purposes of state tort claims.⁵¹ So, while the statute itself provides for a civil penalty to be enforced by the U.S. Attorney General, those individuals most likely to agitate for enforcement—shippers whose livestock were injured or killed in transit—can simply collect their compensation in states which accept this federal standard as proof of *negligence*. This pattern decreases the likelihood that the only party with an interest in the *animal’s* suffering—the U.S. government—will ever become involved. Yet it also serves as a model of how self-interested parties to a contract can provide additional teeth for animal welfare statutes, simply by using them to their own ends.

Further, courts have consistently found the statute to prohibit shippers and carriers from contracting out of the duties it imposes.⁵² This reaffirms some notion of duty accruing to the animals themselves—though whether this qualifies as the “right” contemplated by Senator Morrill is a matter of philosophical debate beyond the scope of this article. Courts have also flushed out the meaning of the watering, feeding, and resting provisions of the statute with an eye towards the interests of the animals in humane treatment. A powerful example is *Southern Pac. Co. v. Stewart*, in which the court held that a railroad violated the 28-Hour Law by unloading the animals into open corrals in sand without shade or covering, because—since the weather was very hot—such pens could not be considered properly equipped for the “resting” of animals.⁵³ Other cases have interpreted “rest” to require that each animal, simultaneously, have space to lie down in, regardless of whether or not he chooses to do so.⁵⁴

All of this sounds like relatively robust protection, at least as compared to the near total license enjoyed by the owners of factory farms. Yet it is quite obvious that the cases enforcing the 28-Hour Law disappear after the 1930’s. The reason is the eventual institutionalization of the truck as a vehicle for transporting livestock; the Department of Agriculture (USDA) has not interpreted the 28-Hour Law’s application to “vehicle or vessel” to include transportation via truck, and has thus issued no regulations in the field.⁵⁵ In other words, nothing prevents trucking companies from transporting animals for periods long exceeding 28 hours, which makes circumstances like those of the pigs described in the preceding section perfectly legal.

⁵¹ *Lynn v. Mellon*, 24 Ala App 144, 131 So. 458 (1930). *See also* *Gilliland v. Southern R. Co.*, 85 SC 26, 67 SE 20 (1910)(To the extent that this act fixes duties and liabilities of carrier and shipper it displaces any state law on the subject).

⁵² *See, e.g., Webster v. Union P.R. Co.*, 200 F. 597 (D.C. Colo. 1912) (holding that a contract between a shipper and a carrier stipulating that carrier will confine cattle for longer than 28 hours is void and non-enforceable in an action between the two, and would not provide a defense for carrier against government action); *Southern R. Co. v. Proctor*, 3 Ala. App., 57 So. 513 (Ala. Ct. App. 1911) (holding that a carrier cannot avoid liability for failing to feed and water animals); *Cleveland, C.C. & S.L.R. Co. v. Hayes*, 181 Ind. 87, 104 N.E. 581 (Ind. 1914) (holding that requirements of the Act cannot be waived by shipper except as specified in the Act); *International & G.N.R. Co. v. Landa & Storey*, 183 S.W. 384 (Tex. Civ. App. 1916).

⁵³ 233 F. 956 (9th Cir. 1916), *reversed on other grounds* 248 U.S. 446 (1919). *See also* *St. Louis & S.F.R. Co. v. Piburn*, 30 Okla. 262, 120 P. 923 (Okla. 1911) (holding that mere physical unloading of sheep is not enough to comply with the Act unless the carrier provides reasonable facilities for feeding, watering, and rest); *Erie R. Co. v. United States*, 200 F. 406 (2nd. Cir. 1912) (where all cars are too small to allow all cattle to lie down at the same time, the carrier must unload for rest).

⁵⁴ *United States v. New York C. & H.R.R. Co.*, 191 F. 938 (W.D.N.Y. 1911); *United States v. Powell*, 65 F.2d 793 (4th Cir. 1933); *Northern Pac. R. Co. v. Finch*, 225 F. 676 (D. N.D. 1915).

⁵⁵ 9 C.F.R. § 89.1-89.5 (promulgated in 28 Fed. Reg. 5967, June 13, 1963).

B. THE ROAD LESS TRAVELED: LIMITED PROTECTIONS UNDER THE ANIMAL WELFARE ACT

The Animal Welfare Act is the most sweeping federal legislation enacted in defense of animals.⁵⁶ To the dismay of animal advocates, it specifically exempts from its protection: [H]orses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management or production efficiency or for improving the quality of food or fiber.⁵⁷

It does, however, protect animals transported by circuses, pet dealers, research facilities or carriers such as airlines or shipping lines. Amongst other things, the Act instructs the Secretary of Agriculture to promulgate standards for “humane handling, care, treatment, and transportation of animals.”⁵⁸ These regulations, codified at 9 C.F.A. § 3.16-42, divide animals into six groups, with varying levels of protection afforded each: 1.) Dogs and cats, 2.) Rabbits, 3.) Hamsters and guinea pigs, 4.) Nonhuman primates, 5.) Marine mammals, and 6.) All other warm-blooded animals.

The regulations protecting transportation of dogs and cats are, unsurprisingly given the sacred nature of such companion animals in our society, quite complex. Amongst other things, carriers must not accept these pets for transport more than four hours before scheduled departure time⁵⁹; they may only accept them with instructions for feeding and watering for a 24-hour period⁶⁰; their holding area must meet certain temperature requirements.⁶¹ The enclosure in which the animals are transported must not have dangerous protrusions, must be clean, and must be marked “on top and on one or more sides with the words ‘Live Animals’ in letters at least 1 inch high.”⁶² Further regulations stipulate that the cargo area of the vessel in which the animals are being transported be “heated or cooled as necessary to maintain an ambient temperature and humidity that ensures the health and well-being of the dogs or cats, and that this area must be kept clean.”⁶³ Generally speaking, these existing regulations—if obeyed—seem adequate to prevent negligent deaths like Jed’s. The challenge, of course, is enforcement, and ensuring adequate consequences for carriers who violate these regulations.

The regulations concerning the transportation of mammals other than dogs, cats, primates, and the prototypical research animals are substantially similar to those covering dogs and cats. The same four-hour rule exists before departure, as does the same requirement for “Live Animal” (or “Wild Animal”) labeling of enclosures, and the code specifies that the enclosures “shall be large enough to ensure that each animal contained therein has sufficient space to turn about freely and to make normal postural adjustments” with the provision that “certain species may be restricted in their movements according to professionally acceptable standards when such freedom of movement would constitute a danger” to themselves or others.⁶⁴ As with cats and dogs, the code specifies that the animals must be given water at least every 12

⁵⁶ 7 U.S.C. § 2131.

⁵⁷ *Id.* § 2132(G).

⁵⁸ *Id.* § 2143(a)(1).

⁵⁹ 9 C.F.A. § 3.13(a).

⁶⁰ *Id.* § 3.13(c)(3).

⁶¹ *Id.* § 3.18(b)-(d).

⁶² *Id.* § 3.14 (a)(6).

⁶³ *Id.* § 3.15(d).

⁶⁴ *Id.* §§ 3.136-3.138.

hours and food at least once every 24 hours.⁶⁵ On paper, then, the protections for the favored and disfavored species (excepting, of course, the invisible class of food animals) are basically equivalent.

Despite these strong paper protections, it is difficult to tell how effectively they are enforced. A Lexis search of all sections of the Code described above reveals just one unreported case involving an enforcement action related to the transportation of animals. In *Hodgins v. Department of Agriculture*, the owners of a kennel that sells dogs and cats to research facilities appealed a \$325 fine and a cease and desist order imposed by the Secretary of Agriculture for a violation of a variety of Animal Welfare Act violations discovered by the Animal and Plant Health Inspection Service, an arm of the Department of Agriculture.⁶⁶ The transportation-related violation involved the Hodgins’ moving animals in a van containing trash and a can of brake fluid, in contravention of 9 C.F.R. § 3.15(g) (specifying that the cargo space be kept clean) and § 3.15(h) (prohibiting the transport of dogs and cats with “any material, substance (e.g., dry ice) or device in a manner that may reasonably be expected to harm the dogs and cats or cause inhumane conditions.”)

An administrative law judge had originally ruled that the Kennels had committed sixty-one violations of the AWA and imposed a \$16,000 fine. On appeal to the Sixth Circuit, however, the court found that “the record did not contain substantial evidence for the majority of the Secretary’s findings, particularly with respect to the willfulness of the alleged violations” and remanded.⁶⁷ In addition, the court awarded the Hodgins \$155,384.99 in attorneys’ fees. On remand, the secretary concluded there was sufficient evidence for fifteen violations of the AWA and imposed a \$325 fine, as well as a cease and desist order. The Hodgins appealed even these minor penalties, but this time around the Sixth Circuit found that they were “not unwarranted” and affirmed the administrative judgment.⁶⁸

Despite the paucity of cases based upon enforcement actions, the regulations of transportation imposed by the Animal Welfare Act may be used to protect animals in other, unique ways. In *Hagan v. Feld Entertainment*, a former employee of the Ringling Brothers and Barnum & Bailey Circus brought a claim for wrongful termination against his employers.⁶⁹ Hagan, a lion handler, was accompanying the circus across the Mojave Dessert in California in the middle of July. Despite the searing heat and Hagan’s repeated requests, the Train Master refused to stop the train so that Hagan could water the lions because the circus was behind schedule. The lions went without drinking water, and without being watered down, from 8:30 am to 2:45 pm. When Hagan was finally able to access the lions he discovered that:

a two-year-old lion named Clyde was unresponsive and was lying in the fetal position with his tongue hanging out, eyes rolled back in his head, and barely breathing. When Hagan placed his hands on Clyde in an attempt to help him, he realized that Clyde's body was extremely hot. As Hagan attempted to help Clyde, the lion died. After sitting and crying with Clyde's body for a period of time, Hagan [contacted] Ringling Bros.'

⁶⁵ *Id.* § 3.139.

⁶⁶ 33 Fed. Appx. 784 (6th Cir. 2002).

⁶⁷ *Id.* at 786.

⁶⁸ *Id.* at 788.

⁶⁹ 365 F. Supp 2d 700 (E.D. Va. 2005).

Operations Manager, John Griggs ("Griggs"), who told him to move Clyde's body to the meat truck and to not say a word about it to anyone.⁷⁰

Afterwards Hagan was ordered to clean up Clyde's car before USDA inspectors arrived, and told not to say a word about the incident to the inspectors or anyone else.⁷¹ But he continued to talk openly about Clyde and, a week after the incident, was terminated.⁷²

On reviewing a motion to dismiss Hagan's suit for wrongful termination in violation of public policy, the federal district court found that the Animal Welfare Act and its USDA regulations constituted "an important policy concern, the welfare of animals in commerce" and thus formed a sufficient basis for the plaintiff's claim under the California law against discharge that violates a "fundamental public policy." In applying the elements of the California claim to the facts of the case, the court notes that "The Act clearly benefits society at large rather than the personal interests of the plaintiff. The Act is designed to insure that the nation's animals in interstate commerce are treated in a safe and humane manner. Society as a whole, rather than an individual such as the plaintiff, benefits from the humane handling of animals."⁷³

The *Hagan* case raises two important facts about the federal regulations on transporting animals. The first is that they can easily be evaded, as Hagan's employers initially succeeded in doing. The second is that they can form the basis for claims between private parties, beyond just enforcement actions. This second point should not be underestimated: where "public policy" forms an element of a state common law claim, the AWA and its regulations provide a clearly-established source of such policy. In this manner, disputes between self-interested private parties can actually serve to impose liability on carriers of animals for violations that the USDA inspectors miss. Even when the actors are Holmes "bad men," animals may benefit, and in the best cases like Hagan's, these claims may provide a means for the individuals closest to the animals to act on their behalf without risking their own financial well-being. In Part IV of this Article I will discuss the implications of this notion for the construction of contracts for carriage.

C. WHEN PIGS FLY? BORIS' LEGACY FOR PETS ON AIRLINES

In contrast to the diminished public (and, by proxy, legislative) interest in the transportation of food animals, recent years have seen an increased scrutiny in the airlines' handling of pets on their planes. In April 2000, 49 USCS § 41721—the "Safe Air Travel for Animals" Act—was signed into law. As is often the case, this initiative was sparked by a human interest story in the media. On Christmas Eve of 1996, a basenji-boxer mix named Boris escaped from baggage handlers at LaGuardia airport, leaving behind only a bloody travel crate. Boris' owner, Barbara Listenik, has said that when she asked the baggage attendant what they would do to help her find him, "he handed me a baggage claim form and said, 'Contact Atlanta - that's where our hub is and that's all that we can do.'"⁷⁴ After six and a half weeks spent roaming the suburbs of Queens, Boris was found with an injured face, and ill from dehydration, malnutrition,

⁷⁰ *Id.* at 704 (citations omitted).

⁷¹ *Id.* at 705.

⁷² *Id.*

⁷³ *Id.* at 710-11.

⁷⁴ Denise Flaim, *What Boris Did for "Flying" Pets*, NEWSDAY, March 6, 2006, available at <http://www.newsday.com/mynews/ny-lspets4652535mar06,0,6719040.column>.

and an infection. The airlines compensated Listenik only for her plane ticket and Boris’ crate, despite the fact that Boris required surgery and Listenik spent \$3600 in vet bills to save him.⁷⁵

In response to Listenik’s lobbying efforts, Senator Frank Lautenberg (D-NJ) and Representatives Robert Menendez (D-NJ) and Peter DeFazio (D-OR) sponsored “Boris’ Bill,” some parts of which became § 41721. The Act imposed two new obligations on airlines in their handling of live animals. First, it created scheme whereby airlines must submit a monthly report on “any incidents involving the loss, injury, or death of an animal during air transport” to the Secretary of Transportation. This information will then be shared with the Secretary of Agriculture and published in the Department of Transportation’s monthly *Travel Consumer Report*.⁷⁶ Second, it stated that the Department of Transportation would work with airlines “to improve the training of employees with respect to the air transport of animals and the notification of passengers of the conditions under which the air transport of animals is conducted.”⁷⁷

With the exception of training employees to transport animals, all of these new protections work to facilitate the right to contract. Both the availability of animal-related data in *Travel Consumer Report*, and the enhanced training of employees to “notif[y] passengers of the conditions under which the air transport of animals is conducted” serve to perfect information for the passenger entering into a contract of carriage. By contrast, it is important to consider the provisions, originally included in the bill, that were omitted from the final statute. The first would have doubled the amount a passenger could recover for the loss of a pet *over that provided for ordinary baggage*.⁷⁸ Another would have required that airplanes being retrofitted for fire prevention also be retrofitted to improve ventilation and temperature control in the cargo holds, in order to increase the safety of transported animals.⁷⁹ Unlike the provisions that made it into law, neither of these related to the ability to form a contract. In fact, the improvement of conditions in cargo holds would protect animals directly, without any asserted interest on the part of their owners.

Because pets like Boris can garner national media attention through an identifiable human interest—the love many Americans feel for their own pets—companion animals enjoy more meaningful legal protections than livestock and other food animals. Yet, when it comes to contracts for carriage, the protections provided by Boris’ Law for companion animals involve a *weaker* conception of duty towards the animal himself than did the 28-Hour Law of the nineteenth century. While a 28-hour train-ride culminating in slaughter is doubtless less desirable to a living creature than a five-hour plane flight culminating in reunion with an owner, most of the protections of the former *could not be contracted out of*. Meanwhile, for Boris’ Law to have made any difference to Boris himself, his owner would have had to: a.) have read the monthly publication of the Department of Transportation regularly enough to form a judgment about the relative safety of various airlines, and either b.) have been able to afford to choose the “safest” airline without regard to cost or availability of flight or c.) have decided to leave Boris at home. Given the unlikelihood of this narrative unfolding in actuality, it is likely that Boris would find himself in precisely the same plight even with his law in place. The protections that could have helped him directly—i.e., a mandate for better temperature control in the hold, or at least an

⁷⁵ *Legislators Lobby For Safer Air Travel For Pets*, WORLD AIRLINE NEWS, March 3, 2003

⁷⁶ 49 USCS § 41721(a), (c)-(d).

⁷⁷ § 41721(b).

⁷⁸ THE HUMANE SOCIETY OF THE UNITED STATES, *The Safe Air Travel for Animals Act*, at http://www.hsus.org/pets/pet_care/caring_for_pets_when_you_travel/traveling_by_air_with_pets/the_safe_air_travel_for_animals_act.html.

⁷⁹ *Id.*

increased monetary incentive for the airline to provide such a feature on its own—were left on the drafting room floor. In fact, the allusion of increased transparency occasioned by Boris' Law might actually entrench an airline's ability to *escape* liability for the death of pets through its negligence: as *Deiro* demonstrated, the better informed a party to a contract, the more likely a suspect term to be upheld.

The new reporting policy has not been in place long enough to judge its efficacy in preventing harm to animals during flight. Over the limited range of months for which data is available, the numbers of deaths and injuries *have* declined, but this also corresponds to the movement from summer to winter and the presumably decreased likelihood of deaths by heat exhaustion, so it is difficult to ascribe much value to the trend. The bottom line here is that, while the statutory laws regulating transportation of pets offer much more protection than those regulating the morally invisible class of food animals, *both* of these schemes—at least within those spheres in which they apply in practice—fall short of the conception of innate animal moral worth embodied in the protections of the 28-Hour Law.

IV. MOVING FORWARD: SOME SUGGESTIONS FOR JURISPRUDENTIAL AND LEGISLATIVE CHANGE

A. “UNSAVORY AGREEMENTS” AND CREATIVITY IN THE COMMON LAW OF CONTRACTS

Justice Holmes famously declared that “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict.”⁸⁰ This principle, when applied in the context of contracts, suggests a useful mechanism through which protections for animals may be enforced, even by parties acting in support of their own self-interests. For the whole universe of reasons that contract disputes arise, it will very frequently be in one party's interest for a contract to be declared invalid, even if his motivations have nothing to do with animal welfare. Thus, two traditional common law doctrines for the invalidation of contracts—unconscionability and voidness as against public policy—both of which are long-recognized and respected, may be utilized by judges to give extra protection to animals. Because in most cases contractual relations govern the transportation of animals, these doctrines have particular power in this area.

1. INVALIDATION AS AGAINST PUBLIC POLICY

While parties are generally free to “contract as if no one is watching,” courts sometimes find that the interest in freedom of contract is outweighed by another interest and will refuse to enforce the agreement or some part of it.⁸¹ Farnsworth notes that the two primary motivations for such refusal are 1.) to sanction undesirable conduct by the parties or others⁸² and 2.) a belief that enforcement would cause courts to uphold an unsavory agreement.⁸³ Critical to the animal law context is the fact that “these considerations turn on reluctance to aid the promisee rather than on

⁸⁰ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

⁸¹ 326 E. ALLAN FARNSWORTH, CONTRACTS § 5.1 (3rd ed., 1999).

⁸² *Sirkin v. Fourteenth St. Store*, 108 N.Y.S. 830 (N.Y. App. Div. 1908) (“I think nothing will be more effective in stopping the growth and spread of this corrupting and now criminal custom [of commercial bribery] than a decision that the courts will refuse their aid to a guilty vendor or vendee”).

⁸³ *Bank of the United States v. Owens*, 27 U.S. 527 (1829) (“no court of justice can in its nature be made the handmaid of inequity”).

solicitude for the promisor.”⁸⁴ To cite an imaginary animal law contractual dispute, a court might not find that a shipper, who placed his pigs in a carrier’s un-air-conditioned vessel on a July day, deserves to be compensated for his loss after they suffocate to death, if he agreed to a waiver of liability. However, the court might find it “unsavory” to uphold the carrier’s limitation of liability if he also finds that the cruel conditions in which the animals were traveling violate public policy.

The great utility of this doctrine for our purposes stems from the freedom courts have in deciding what constitutes a contravention of public policy. As Farnsworth puts it, “In some cases, the conduct that renders the agreement unenforceable is also a crime, but this is not necessarily or even usually so.”⁸⁵ This means two things. First, the existing prohibitions under the AWA and state animal welfare laws constitute solid public policy which courts may invalidate contracts for contravening. If one of the primary weaknesses of these laws is low enforcement—through blinking on the part of regulators, scarcity of prosecutorial or administrative resources, and so forth—contractual disputes could generate a class of private attorneys general: contractual parties looking out for their own pocketbooks.

The second, albeit more tenuous, consequence of this doctrine is that courts have a long-standing power in the common law to develop public policies of their own. Just a few examples include the policy against impairment of family relationships,⁸⁶ the policy against gambling,⁸⁷ the policies against restraint of trade and on alienation of property,⁸⁸ the policies against encouraging litigation or interfering with the judicial process, and the policy against improperly influencing legislators and other government officials.⁸⁹ In *Tunkl v. Regents of University of California*, the California Supreme Court held unenforceable a standardized release from liability for negligence that was a condition of admission to a research hospital.⁹⁰ The court’s opinion cited a series of factors in its articulation of public policy: the hospital was “a business of a type generally thought suitable for public regulation,”; medical care was “of great importance to” the public; the hospital “held itself out as “willing to perform this service for any member of the public,” it had “a decisive advantage of bargaining strength,” and its “standardized adhesion contract” made no provision for insurance against negligence through “payment of additional reasonable fees,” and finally, the plaintiff’s “person or property” was under the hospital’s “control...subject to the risk of carelessness.”⁹¹

It is clear that many of these factors might also apply, for example, to the case of a pet-owner turning her dog over to American Airlines. In particular, the relevance of the “importance” of the matter “to the public” resonates with the broad public support for animal welfare that receives no legislative expression.⁹² The major difference between this hypothetical and *Tunkl* is the factor of the availability of additional insurance, the existence of which cut in

⁸⁴ FARNSWORTH, *supra* note 82, at 323.

⁸⁵ *Id.*

⁸⁶ See FARNSWORTH, *supra* note 82, at 337-43.

⁸⁷ See *id.* at 326n.4.

⁸⁸ See *id.* at 331-37.

⁸⁹ See *id.* at 327n.7.

⁹⁰ 383 P.2d 441, 445-46 (Cal. 1963).

⁹¹ FARNSWORTH, *supra* note 82, at 329.

⁹² For example, a recent Ohio State University Study of 1,800 Ohioans found that 92% of respondents agreed or strongly agreed with the proposition that “it is important that farm animals are well cared for.” 81% agreed or strongly agreed that “the well-being of farm animals is just as important as the well-being of pets.” Jeff S. Sharp & Andrew Rauch, *Ohioans’ Attitudes About Animal Welfare*, 1 OHIO SURVEY OF FOOD, AGRICULTURAL, AND ENVIRONMENTAL ISSUES (2004).

favor of enforcing the contracts for carriage in *Deiro* and *Gluckman*. Beyond the structural similarities between animal carriage and the *Tunkl* case in particular, however, *all* of these judge-made doctrines demonstrate the flexibility courts have under the common law of contracts to obtain equitable results with respect to the interests of third parties and society in general. That said, there is no question that the force of the doctrine is weaker in cases lacking actual legislation as a source for generating policy. Courts that have followed *Tunkl* “have often given weight to a public interest evidenced by state regulation.”⁹³ Even more significantly, judge-made doctrines can, of course, be pre-empted by legislation. The policy against restraint of trade, for example, has been pre-empted by federal antitrust laws. In the transportation context, it seems likely that any attempt to invalidate contracts for the carriage of farm animals for contravening a public policy against cruelty to animals would be defeated by the explicit exemption of farm animals from the Animal Welfare Act. One might also argue that Congress’ decision to strike from the Safe Air Travel for Animals Act the proposed distinction between pets and luggage for the purposes of damages evinces a public policy *against* requiring higher damages.

Despite these weaknesses, the mere use of this doctrine to provide teeth to under-enforced protection laws seems promising; and it provides, at minimum, a source for judicial innovations in the field. The only case to date that has declared a contract for carriage of an animal void as against public policy is *Klicker v. Northwest Airlines*.⁹⁴ In that case, the Ninth Circuit voided a contractual term limiting Northwest’s liability for the death of the plaintiffs’ golden retriever, Sir Michael Robert. The court cited the judge-made rule preventing carriers from contracting out of all liability for negligence: “Carriers may partially limit their liability for injury, loss, or destruction of baggage on a ‘released valuation’ basis, whereby in exchange for a low carriage rate, the passenger-shipper is deemed to release the carrier from liability beyond a stated amount. The released valuation limitations bind the passenger-shipper to the restriction on liability, however, only if he has notice of the rate structure and is given the opportunity to pay the higher rate in order to obtain greater protection.”⁹⁵ In this case, the plaintiffs were not offered the opportunity to pay a higher rate, and so the contractual term limiting the airline’s liability was declared invalid.

While *Klicker* follows a policy forbidding total limitations on liability for harm to baggage generally, it is worth considering how the case—or another case in which the plaintiffs *did* have the opportunity to pay a higher rate and chose not to—might have turned out if the court relied upon the public policy embodied in the USDA’s regulations of animal transportation. It is conceivable that a judge could invalidate an airline’s contracting out of full liability for actions that violate those standards for humane care. Such a scenario would still entail the problem of determining the animal’s *actual* value, but at least the pet-owners would then have the more flexible field of tort law open to them. And to make a brief aside: another question this discussion leaves open is how, in the context of farm animals, the Humane Slaughter Act might be utilized as a source of public policy in contract disputes. The nature of the contracts involved in the slaughter of animals exceeds the transportation focus of this Article, but it seems a field ripe for inquiry, and a potential source of indirect enforcement for the notoriously under-enforced Act.

⁹³ See, e.g., *Emory Univ. v. Porubiansky*, 282 S.E.2d 903 (Ga. 1981) (since “practice of dentistry is a profession licensed and controlled by the state” it contravenes public policy to allow a dentist “to relieve himself by contract of the duty to exercise reasonable care”).

⁹⁴ 563 F.2d 1310 (9th Cir. 1977).

⁹⁵ *Id.* at 1315.

En balance, the utilization of the common law invalidation of contracts as against public policy has a number of striking virtues. In the first place, it utilizes the self-interest of parties in having their contracts upheld as a motivation for adhering to humane procedures in the transportation of animals. In the second place, it allows judges to make principled, limited inroads in the realm of animal protection without spinning into the stratosphere of judicial legislation: laws that protect [some] animals from inhumane transportation are already on the books, and even an avowed textualist cannot object to their citation as legitimate sources of public policy.

2. UNCONSCIONABILITY

Another doctrine of which courts should make greater use in policing contracts for carriage of animals is that of unconscionability, which is well-suited to deal, at least, with the transportation of pets. The Uniform Commercial Code (UCC) states that: “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause so as to avoid any unconscionable result.”⁹⁶ Although this section technically only applies to “goods,” courts have extended it to other sorts of contracts.⁹⁷ The standard definition of unconscionability, which the Code itself leaves open-ended, is that it must “include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁹⁸ The ubiquitous hazy process of giving content to the word “unreasonable” provides space for courts to take into account societal conceptions of what constitutes a fair balance of “favorability” between the parties. A contractual term that makes no distinction between the living, mutual bond between an owner and his pet, and the practical interest in one’s suitcase, could be argued to be unconscionably weighted against the legitimate interests of the owner.

In determining unconscionability, the cases refer to the “absence of meaningful choice” factor as “procedural” and the “unreasonably favorable” factor as “substantive” unconscionability. Farnsworth notes that “Most cases of unconscionability involve a combination [of the two], and it is generally agreed that if more of one is present then less of the other is required.”⁹⁹ Though the definition of procedural unconscionability includes situations with inequality in bargaining power, the Supreme Court has held that standard contracts of adhesion such as cruise line tickets are not unenforceable, simply because individual terms were not negotiated: “Common sense dictates that a [ticket] will be a form contract the terms of which are not subject to negotiation and that an individual purchasing the ticket will not have bargaining parity with the cruise line.”¹⁰⁰ Where the specific terms of an adhesion contract are not clear, however, courts have found them unenforceable, as in the well-known case of *Wallis v. Princess Cruises*.¹⁰¹ Taken together, these cases make it clear that an airline ticket that limits

⁹⁶ Uniform Commercial Code § 2-302(1), Unconscionable Contract or Clause.

⁹⁷ FARNSWORTH, *supra* note 82, at 308.

⁹⁸ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

⁹⁹ FARNSWORTH, *supra* note 82, at 312.

¹⁰⁰ *Carnival Cruise Lines v. Shute*, 499, U.S. 585, 593 (1991).

¹⁰¹ 306 F.3d 827, 834 (9th Cir. 2002) (holding that a contract clause on a passenger's that simply refers to the “Convention Relating to the Carriage of Passengers and Their Luggage by Sea of 1976 (Athens Convention)” does not “reasonably communicate” a liability limitation).

liability for negligent death of a pet will not be deemed unconscionable on procedural grounds alone. Yet this leaves open the possibility that, with a sufficiently strong finding of substantive unconscionability, the inequality of bargaining power in an adhesion contract of carriage may provide at least the minimum procedural unconscionability for a court to invalidate the liability term. Furthermore, there is a theoretical possibility of “exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone.”¹⁰² Either way, the key lies in how a court determines substantive unconscionability.

Clauses, like those applicable to liability for harm to pets on airplanes, that limit remedies available to a buyer of goods are generally enforceable.¹⁰³ However, “a clause limiting or excluding liability for consequential damages is unenforceable if the limitation or exclusion is unconscionable and such a limitation for personal injury due to consumer goods is prima facie unconscionable.”¹⁰⁴ Thus, it *still remains open* to courts to decide whether the limitation of damages for a negligently-transported pet’s death is an unconscionable limitation or exclusion. To a certain extent, this cycles back to the earlier question of valuing pets: whether or not such a limitation is unconscionable could end up turning on the market value of the dog relative to the limit of liability for baggage, as market value is still the prevailing standard of valuation (though in cases like *Deiro*, which involved economically valuable pets, even that would be a vast improvement). But courts should also consider that—like the *per se* unconscionability of a limitation for personal injury—a limitation of liability where a living creature is involved is uniquely suspect, insofar as it *provides no incentives for the airline to handle such a creature any differently than they would a suitcase*. Supporters of animal protections are charged with sentimentality and anthropomorphism, but the reality of the tragedy of a beloved pet suffocating to death in 140 degree temperatures, in contrast with the pitiful valuation imposed by airline tickets, is a prime candidate for the flexible, human judgments embedded in the unconscionability doctrine.

V. THE HIGH ROAD AND THE LOW: CONCLUDING THOUGHTS

“He felt as if everything in him was *falling*, as if he had been filled full of a heavy liquid that all wanted to flow one way, and all the others were leaning as he was leaning, away from this queer heaviness that was trying to pull them over....[T]hey all got used to it, just as they got used to seeing the country turn like a slow wheel, and just as they got used to the long cruel screams of the engine, and the steady iron noise beneath them which made the cold darkness so fearsome, and the hunger and the thirst and the continual standing up, and the moving on and on and on as if they would never stop.”

“*Didn’t* they ever stop?” [a calf] asked.

“Once in a great while,” she replied. “Each time they did,” she said, “he thought, ‘Oh, now *at last!* *At last* we can get out and stretch our tired legs and lie down! *At last* we’ll be given food and water!’ But they never let them out. And they never gave them food or

¹⁰² Gillman v. Chase Manhattan Bank, 534 N.E. 2d 824, 829 (N.Y. 1998).

¹⁰³ See, e.g., Martin Rispens & Son v. Hall Farms, 621 N.E. 2d 1078, 1087 (Ind. 1993) (“Indiana courts have rejected claims that contractual limitations of remedy are substantively unconscionable.”)

¹⁰⁴ FARNSWORTH, *supra* note 82, at 316.

water. They never even cleaned up under them. They had to stand in their manure and in the water they made.”¹⁰⁵

This excerpt from James Agee’s short story “A Mother’s Tale” presents a cow’s narrative of his journey to the slaughterhouse in a train, related second-hand by another cow to her calves. Critics of the animal welfare movement would doubtlessly criticize this passage for ascribing human capacities of inquiry and sentimentality to cattle, and they would be right in some senses. Yet what Agee tries to capture, through those unique narrative tools by which humans communicate, is the added terror experienced by animals in transportation that comes precisely *because* of their inability to understand their unnatural surroundings with anything like human cognition. They are plunged into a world of human creation, without the human ability to contemplate, at least, a potential end to their suffering, or a potential reason for it.

Humans have already officially recognized this terror and this suffering: Congress attempted to mitigate it, at least a little, by way of the 28-Hour Law. At a time when the nation was in the throes of the Industrial Revolution, it was still within the moral grasp of our lawmakers to consider the difference that a couple of hours of sunlight and grass might make to living creatures trapped in the endless night of livestock transportation. Congress recognized it again by passing the Animal Welfare Act—yet with the new understanding that, in the context of food animals, as Lewis Petrinovich says, “[h]igh technology makes it unnecessary (and impossible) to pay attention to individual animals...with the total emphasis on increased productivity at the lowest cost possible.”¹⁰⁶ It is important, as a society, to be clear about the balance we are striking. The 28-Hour Act demonstrates that it is far from an established human value that efficient food consumption *must* outweigh animal welfare: our society has made a conscious decision to compromise *existing* ethical values, once it has become so much more profitable to do so.

This is hardly a novel argument in the world of animal law—activists make it at every turn, when urging legislation that seems to reflect mere common sense. For example, a truck should be considered a “vehicle” for the purposes of a law intended to impose humane conditions on the meat industry. The word “animal” should not exclude the 8 billion cows, pigs, and chickens that collectively suffer more than any other class of animals in our society for the purposes of the “Animal Welfare Act.” And it should not be too much to ask to make airlines take greater care with our pets than with our suitcases. These arguments have continued to fail when put to legislatures but, as this Article has argued, perhaps they have the opportunity to gain unique traction in the field of transportation, due to the contractual relationships that govern it. In the absence of the legislative protections so greatly needed, it is possible that—at least in some cases, at least for a few creatures—the common law may be able to provide some relief. And it may do so simply through traditional judicial tools and articulation of the simple values of compassion that have existed in our society all along. For all of the others we should not give up on the task of challenging the statutory gaps, and arguing for mercy.

¹⁰⁵ James Agee, *A Mother’s Tale*, THE COLLECTED SHORT PROSE OF JAMES AGEE (ed. Robert Fitzgerald, 1969).

¹⁰⁶ LEWIS PETRINOVICH, DARWINIAN DOMINATION 356 (1999).

Appendix A: Animal Incident Reports on U.S. Airlines: May 2005-2006¹⁰⁷

A. Incidents by Month

Month	Deaths	Injuries	Lost
May 2005	4	5	1
June 2005	5	4	1
July 2005	2	3	0
August 2005	4	4	1
September 2005	1	0	0
October 2005	5	0	0
November 2005	1	1	0
December 2005	0	0	1
January 2006	1	1	0
February 2006	0	0	1

B. Incidents by Carrier

Airline	Deaths	Injuries	Lost
Alaska Airlines	1	3	1
American Airlines	5	0	0
Comair	0	1	0
Continental	7	6	0
Delta	2	0	2
Frontier	0	1	0
Hawaiian	1	3	0
Horizon	2	1	0
Midwest	1	0	0
Northwest	0	2	1
Skywest	1	0	0
United	3	0	0
US Airways	1	1	1

¹⁰⁷ Source: AVIATION CONSUMER PROTECTION DIVISION, U.S. DEPARTMENT OF TRANSPORTATION, AIR TRAVEL CONSUMER REPORTS (2005-2006) available at <http://airconsumer.ost.dot.gov/reports/index.htm>.